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Supreme Court of the United States

OCTOBER TERM, 1963

No. 857

ROBERT F. TROST,

Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Respondent.

BRIEF OF RESPONDENT, AMERICAN-HAWAIIAN STEAMSHIP COMPANY, IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GRAY WILLIAMS,
Counsel for Respondent,
American-Hawaiian Steamship Company,
116 John Street,
New York, New York 10038.

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Statement Regarding Petition

This petition seeks review of a finding in the court of appeals that there was no Jones Act negligence under the facts presented. That holding is not in conflict with the applicable decisions of this court and it is not in conflict with the decision of any other court of appeals.

Statement Regarding Previous Proceedings

This action was instituted to recover damages for personal injuries under the Jones Act (46 U.S.C. 688) by a ship's purser. He was injured while ashore in Bordeaux, France, when he stepped into an open trap door in a public cafe while in the company of the ship's captain.

The case was tried without a jury in the district court. That court awarded the petitioner damages, holding that the shipowner was negligent because the captain failed to warn the purser of the opening in the floor.

The decision was reversed in the court of appeals, the late Judge Charles E. Clark dissenting (324 F. 2d 255). A motion for rehearing was denied, Judge Clark dissenting, and a petition for rehearing, *in banc*, also was denied, all of the active judges concurring, except Judge Clark.

Statement of the Facts of Petitioner's Action

At the time of his accident, the petitioner was a forty-five-year-old ship's officer, serving as purser of the respondent's steamship *Nevadan*. He had gone ashore in Bordeaux with the captain to attend to ship's business at the American Consulate some four or five miles away from the ship.

After completing their business at the Consulate, the pair set out for the office of the ship's agent. While on their way, they stopped at a cafe to exchange five dollars U. S. currency into French francs and to have coffee.

The two men sat at a counter, side by side, the captain sitting between the petitioner and the front door of the cafe. While they were thus seated, workmen delivered produce to the cafe, in the course of which delivery they left open a trap door in the floor at the end of the counter some fifteen feet away from the pair. The opening was about five feet long and two and one-half feet in width.

When the captain and the petitioner had finished their coffee, they proceeded to leave the cafe, walking in single file with the captain leading the way. Although the captain was five inches shorter than the petitioner, the petitioner says that he was not able to see over the captain's shoulder. When they reached the end of the counter, the petitioner claims that the captain stepped aside to avoid the opening. The petitioner proceeded straight ahead and his right foot went into the open place, causing him to fall.

The district court found that the captain was negligent in failing to call the opening to the petitioner's attention. Reversing that ruling, the court of appeals held that the captain was not negligent because he was under no legal duty to warn the purser of the condition of the floor. It held further that even assuming the captain had been negligent, his failure to call the opening to the attention of the purser was not within the scope of the captain's employment as to impose derivative liability on the shipowner.

POINT I

The Court of Appeals did not commit error in holding that there was no negligence on the part of the ship's captain.

The petitioner was a mature ship's officer in full control of all of his faculties. The opening in the floor was clear, obvious and readily to be observed through the reasonable

use of the senses. Both the captain and the petitioner had the same opportunity to become aware of the danger and it was reasonable for the captain to assume, as he did, that the petitioner was equally conscious of the opening. In the light of those facts, the decision of the court of appeals is entirely in accord with the settled authorities.

For example, in *Farrell* v. *United States* (2d Cir. 1948), 167 F. 2d 781, the libelant was a young seaman who received injuries ashore in an Italian port when he fell into an open dry dock on his way to the ship. It was held that failure to warn him of the dangerous condition of the dock area was not negligence rendering the shipowner liable where that condition was obvious.

In *Paul* v. *United States* (3rd Cir. 1953), 205 F. 2d 38, the seaman involved had sustained injuries ashore at Brindisi, Italy. The ship was moored to a long dock over which ran a cement walkway. There were no railings or lights and while on his way ashore after dark, the man fell into a deep recess in the walkway. Although the dock was neither owned nor controlled by the shipowner, the seaman contended that the shipowner was liable to him for failing to inspect and warn him of the existence of the hazard. The court of appeals held that the shipowner had no duty to the seaman to warn him of the condition. In disposing of the contention that a guardian-ward relationship between the shipowner and the seaman required the shipowner to warn the seaman of the hazard, the court said:

> "On that score, it should be noted that when we say that seamen are the wards of admiralty, we do not thereby mean to throw open the gate to liability for any and all injuries which befall them."

To similar effect is *Wheeler* v. *West India SS Co.* (2d Cir. 1953), 205 F. 2d 354. There the injured seaman was a second assistant engineer of a vessel tied up to a mole

at the end of a viaduct over which railroad trains passed and which was neither owned nor controlled by the shipowner. The engineer had gone ashore in the afternoon and was returning to the ship over the unlighted viaduct when, without warning, he was injured by a locomotive backing down the viaduct. In holding that the shipowner was not negligent, the court pointed out that there was no duty on the part of the shipowner to warn crew members against open and obvious risks or to warn them that the railroad tracks were used by trains in the nighttime.

In *Robinson, admx.* v. *Northeastern SS Corp.* (2d Cir. 1956), 228 F. 2d 679, the decedent and another crew member returned to the ship through a customs compound during the early morning hours. The decedent was drunk. At the gate of the compound, while the other man was talking to the taxi driver, the decedent got out of the cab and disappeared. About an hour later, his body was found inside the compound and he had been run over by a locomotive. Neither the locomotive nor the compound was owned or controlled by the shipowner. The court of appeals held that in the absence of a showing that the fellow seaman's action in assisting the intoxicated seaman to the ship was either requested by the shipowner or authorized by it, negligence on the part of the fellow seaman could not be imputed to the shipowner. The district court also had found that the shipowner owed no duty to the decedent to warn him. Appeal from that part of the district court decision was abandoned by the plaintiff-appellant but the court of appeals commented that it would have held that the ruling of the district court was correct, citing *Wheeler* v. *West India SS Co.* (*supra*) and *Farrell* v. *United States* (*supra*).

Bearing in mind the need for liberal construction of the Jones Act in seamen's cases, there is no basis for holding that there was negligence on the part of the captain here.

POINT II

The Court of Appeals did not commit error in holding that the acts of the captain created no derivative liability on the part of the shipowner.

The holding of the court below that, in any event, there was no foundation for a claim of derivative liability against the shipowner is well supported by the applicable authorities, *Robinson, admx.* v. *Northeastern SS Corp.* (*supra*); *Thurnau, admx.* v. *Alcoa Steamship Co.* (2d Cir. 1956), 229 F. 2d 73. In the latter case, the court refused to impute to the shipowner liability under the Jones Act for a shoreside fatality arising out of an automobile accident. The decedent was the third mate of the defendant's vessel, riding as a passenger in a motor car negligently driven by a fellow crew member on their way to duty aboard the ship.

The petitioner here has cited one hundred and one cases in support of his application. It does not seem necessary or appropriate to attempt to review or analyze those decisions in such a proceeding as this is, except to point out that the cases cited by the petitioner refer either to facts involving accidents on shipboard, or in areas closely adjacent to the ship and under the control of the shipowner, or to assaults by "unseaworthy" crew members, and those decisions are not precedents properly to be applied to the facts involved in this petition. Not one of the decisions mentioned by the petitioner is authority to support a holding that the captain here owed a duty to warn the petitioner of the open and obvious condition of the floor of the cafe or that the captain's failure to warn the petitioner could impute negligence to the respondent shipowner.

As appears from the decisions which we have previously offered, there is not involved in this matter any question concerning the application of the Jones Act which has not

already been settled. In addition to the two judges comprising the majority of the original appeal panel, six other active judges of the court of appeals were in agreement that a rehearing, *in banc*, would not be justified. It would seem to follow that this is not a matter for further review by the Supreme Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GRAY WILLIAMS,
Counsel for Respondent,
American-Hawaiian Steamship Company,
116 John Street,
New York, New York 10038.